Filed 1/16/09 DeCamp v. Broad Street Investment Management CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MARTHA DECAMP,

Plaintiff and Appellant,

v.

BROAD STREET INVESTMENT MANAGEMENT et al.,

Defendants and Respondents.

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A120522

(Marin County Super. Ct. No. CV072890)

Appellant Martha DeCamp filed a lawsuit against Broad Street Investment Management, LLC (Broad Street), Broad Street Capital Partners I, LP, Broad Street Ventures, LLC, Brennan Dyer & Company, LLC, James Brennan, and Douglas Dyer (collectively defendants).[1] Defendants moved to quash the summons and complaint or, in the alternative, to stay or dismiss the action (Code Civ. Proc., §§ 410.30, subd. (a), 418.10).[2] They contended, among other things, that DeCamp was contractually obligated

[1] DeCamp also named Shawn Lyons as a defendant. He has not been served with the complaint and is not a party to this appeal.

[2] Unless otherwise noted, all further statutory references are to the Code of Civil Procedure. Section 410.30, subdivision (a) provides: "When a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just." Section 418.10, subdivision (a)(1) provides that

to bring her lawsuit in Delaware because she executed a contract containing a forum selection clause. The trial court granted the motion, stayed the action, and set a dismissal date. The court later dismissed the case pursuant to the parties' stipulation.

On appeal, DeCamp contends the trial court erred in enforcing the forum selection clause because she did not have sufficient notice of the existence of the clause and because the contract containing the clause is void for fraud in the execution. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Complaint

In June 2007, DeCamp filed an unverified complaint alleging seven causes of action against defendants, including breach of fiduciary duty, fraud, and negligent misrepresentation. According to the complaint, Lyons encouraged DeCamp to invest her retirement savings in Broad Street by telling her that she would be able to "increase her income fast." Lyons did not, however, discuss the risk involved, nor did he tell her that the investments were "completely inappropriate given her financial objectives, financial needs, assets, and liquidity."[3] Lyons convinced DeCamp to invest a total of $186,091 in Broad Street: $31,424 in December 2001 and $154,667 in October 2002. In March 2004 and several times thereafter, DeCamp asked Broad Street to liquidate her investments and return her money. Broad Street, however, ignored her "repeated requests" and failed to return her money to her.

The complaint alleged that Broad Street required each potential investor to execute a Qualified Purchaser Questionnaire (Questionnaire) and a Subscription Agreement/Power of Attorney (Subscription Agreement). After completing the Questionnaire and the Subscription Agreement, the potential investor was required to send the documents to Broad Street. DeCamp alleged that she "never filled out" the

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a defendant may file a motion to "quash service of summons on the ground of lack of jurisdiction of the court over him or her."

[3] The complaint also alleged that Lyons failed to tell DeCamp that his financial advisor license had expired and that he would receive a commission if DeCamp invested in Broad Street.

Questionnaire and the Subscription Agreement and never sent either document to Broad Street. She claimed that she had "never even received a complete copy of the . . . Subscription Agreement until late 2004" and that defendants "did not provide [her] with the . . . Subscription Agreement which would have provided [her] with necessary information about whether she was a 'Qualified Investor.'" The Subscription Agreement defined a "'Qualified Investor'" as "an individual whose assets exceeded $1 million and whose yearly income was at least $200,000." DeCamp alleged that if she had known that she was not a Qualified Investor, she would not have invested her money in Broad Street.

Defendants' Motion and DeCamp's Opposition

Defendants moved to quash the summons and complaint or, in the alternative, to stay or dismiss the action (§§ 410.30, subd. (a), 418.10). Among other things, defendants argued that DeCamp signed the Subscription Agreement, which contained a mandatory forum selection clause requiring her to litigate the dispute in Delaware.[4] In support of their motion, defendants submitted the declarations of Dyer and Brennan, Broad Street's managing members and partners. Brennan and Dyer averred that the "Subscription Agreement [was] duly executed" by DeCamp and that it contained a forum selection clause.

Brennan's declaration attached sections A through D of the Subscription Agreement, including the forum selection clause set forth in section D(17).[5] The

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[4] Because we conclude that the trial court did not abuse its discretion in enforcing the forum selection clause, we find it unnecessary to recite facts regarding defendants' contacts with California.

[5] The forum selection clause provided in relevant part: "Notwithstanding the place where this Subscription Agreement may be executed . . . all of the terms and provisions hereof shall be construed in accordance with and governed by the laws of the State of Delaware, without giving effect to its conflict of laws principles. Any dispute that may arise out of or in connection with this Subscription Agreement shall be adjudicated before a court located in Delaware and the parties hereto submit to the exclusive jurisdiction and venue of the court of the State of Delaware with respect to any action or legal proceeding commenced by any party, and irrevocably waive any objection they now or hereafter may have respecting the venue of any action or proceeding brought in such a court or respecting the fact that such court is an inconvenient forum, relating to or arising out of

declaration also attached the signature pages which Brennan averred were from "the Subscription Agreement." These pages were dated December 2001, September 2002, and November 2002 and bore DeCamp's signature.[6] Finally, Brennan attached signature pages from the Questionnaire. These pages also bore DeCamp's signature.

DeCamp opposed the motion. In her memorandum of points and authorities, DeCamp contended that she was not bound by the forum selection clause because "she never fully executed the [Subscription] [A]greement." More specifically, she claimed that she filled out only two of the four parts of the Subscription Agreement, "(the parts requiring only basic contact information). She never saw, nor did she fill out and sign, parts II and III (the parts containing the . . . [Q]uestionnaire.)" (Italics omitted.) She also argued that the forum selection clause was unenforceable because California had a strong public policy favoring the adjudication of disputes involving securities fraud in California.

In a declaration submitted in support of the motion, DeCamp stated: "I never saw the complete Subscription Agreement . . . until years after I gave Broad Street Investment Management my money. [¶] Likewise, I did not see, nor did I complete, the . . . Questionnaire at the time I purchased my . . . investment. If I had, I would have known that this investment was not appropriate for me. . . ." DeCamp attached several documents to her declaration, including the executed signature pages for the Questionnaire and the Subscription Agreement.

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this Subscription Agreement or any acts or omissions relating to the sale of the Securities. . . ."

[6] It is not clear why there are three signature pages or to what precise document the signature pages were attached. According to the complaint, DeCamp invested money with Broad Street on two occasions, once in December 2001 and again in October 2002. It is also not clear whether the Questionnaire is a separate document from the Subscription Agreement.

The Court's Ruling

In October 2007, the court held a hearing on defendants' motion. At the end of the hearing, the parties discussed whether DeCamp did receive the entire Subscription Agreement before she signed it. This prompted counsel for DeCamp to remark, "Your Honor, if that's the case, I would ask — if you believe that is the case, that [DeCamp] has been less than complete, I ask you for either an opportunity to give you further evidence on this [so] she can clarify . . . or an evidentiary hearing on this. This is the end of her case." Counsel for defendants interjected and said, "Your Honor, evidentiary hearings require three days notice."[7] At that point, the court directed defense counsel to "[s]top. . . . It's not an opportunity to rebut every comment that's made in a law and motion hearing." Then the court stated, "[t]he matter will stand submitted."

In December 2007, the court issued an order granting defendants' motion to stay. The order provided, "The action is stayed six (6) months to permit [DeCamp] to refile in Delaware. The Court sets this matter for dismissal on April 29, 2008." In early 2008, the parties stipulated to dismiss the case. On January 11, 2008, and pursuant to the stipulation, the court dismissed DeCamp's lawsuit.

DISCUSSION

I. *Standard of Review*

There is a split of authority regarding the proper standard of review on a motion to enforce a forum selection clause. (*America Online, Inc. v. Superior Court* (2001) 90 Cal.App.4th 1, 7-9 (*America Online*); *Intershop Communications AG v. Superior Court* (2002) 104 Cal.App.4th 191, 198-199 (*Intershop*).) The majority of California courts have reviewed a trial court's decision to enforce a forum selection clause for abuse of discretion. (See, e.g., *Schlessinger v. Holland America* (2004) 120 Cal.App.4th 552, 557;

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[7] We assume defense counsel was referring to California Rules of Court, rule 3.1306, which provides in relevant part: "(a) Evidence received at a law and motion hearing must be by declaration . . . without testimony or cross-examination, unless the court orders otherwise for good cause shown. [¶] (b) A party seeking permission to introduce oral evidence . . . must file, no later than three court days before the hearing, a written statement stating the nature and extent of the evidence proposed to be introduced and a reasonable time estimate for the hearing. . . ."

America Online, supra, 90 Cal.App.4th at p. 9; see also *Bancomer, S.A. v. Superior Court* (1996) 44 Cal.App.4th 1450, 1457.) At least two California courts, however, have applied a substantial evidence standard of review. (See, e.g., *CQL Original Products, Inc. v. National Hockey League Players' Assn.* (1995) 39 Cal.App.4th 1347, 1354; *Cal-State Business Products & Services, Inc. v. Ricoh* (1993) 12 Cal.App.4th 1666, 1679.) In *America Online,* our colleagues in Division Two cogently described the split of authority and persuasively explained the reasons for applying an abuse of discretion standard of review. (*America Online, supra*, 90 Cal.App.4th at pp. 8-9.) Accordingly, we review the order enforcing the forum selection clause for abuse of discretion.

II. *The Trial Court Did Not Abuse Its Discretion in Enforcing the Forum Selection Clause*

"'The enforceability of a forum selection clause is properly raised by a motion to stay or dismiss under . . . section 410.30, as it is a request to the court to decline jurisdiction.'" (*Lu v. Dryclean-U.S.A. of California, Inc.* (1992) 11 Cal.App.4th 1490, 1492, fn. 1, quoting *Furda v. Superior Court* (1984) 161 Cal.App.3d 418, 425; see also *Smith, Valentino & Smith, Inc. v. Superior Court* (1976) 17 Cal.3d 491, 494 (*Smith*).) ". . . California favors contractual forum selection clauses so long as they are entered into freely and voluntarily, and their enforcement would not be unreasonable." (*America Online, supra,* 90 Cal.App.4th at p. 11; *Smith, supra,* 17 Cal.3d at pp. 495-496.) The party challenging the enforceability of the forum selection clause has the burden of proof. (*America Online, supra,* at p. 9; *Intershop, supra,* 104 Cal.App.4th at p. 198.)

A. *Lack of Notice*

First, DeCamp contends the forum selection clause is unenforceable because she did not have sufficient notice of its existence. She contends the trial court's order "defies this common-sense rule" set forth in *Carnival Cruise Lines, Inc. v. Superior Court* (1991) 234 Cal.App.3d 1019, 1026-1027 (*Carnival*). In *Carnival,* plaintiffs purchased tickets for a Carnival cruise from Los Angeles to Mexico. (*Id.* at p. 1021.) The tickets contained a forum selection clause requiring disputes arising out of the ticket contract to be litigated in Florida. (*Ibid.*) After the cruise, plaintiffs sued Carnival; in response, Carnival filed a

section 410.30 motion to dismiss or stay, asserting that the forum selection clause required plaintiffs to litigate the dispute in Florida. (*Id.* at pp. 1021-1022.) Plaintiffs opposed the motion. They argued the forum selection clause was unenforceable for several reasons, particularly because it was "not reasonably communicated" to them. (*Carnival, supra,* 234 Cal.App.3d at p. 1023.) Plaintiffs' attorney filed a declaration stating that certain plaintiffs received their tickets when they boarded the ship and that others never received a ticket at all. (*Id.* at p. 1020.) The trial court denied Carnival's motion. (*Ibid.*)

The appellate court remanded the case to the trial court to conduct further proceedings on the issue of notice. (*Carnival, supra,* 234 Cal.App.3d at pp. 1026-1027.) The *Carnival* court explained: "the forum-selection clause is unenforceable as to any particular plaintiff if the [lower] court determines that such plaintiff did not have sufficient notice of the forum-selection clause prior to entering into the contract for passage. Absent such notice, the requisite mutual consent to that contractual term is lacking and no valid contract with respect to such clause thus exists." (*Ibid.*)

Relying on *Carnival,* DeCamp contends her declaration was sufficient to establish that she — like the plaintiffs in *Carnival* — did not have sufficient notice of the forum selection clause. To support this argument, DeCamp points to her declaration, where she stated, "I never saw the complete Subscription Agreement . . . until years after I gave Broad Street [ ] my money." But not seeing the complete Subscription Agreement is different from not receiving it. As defendants correctly note, DeCamp averred that she had "'never seen'" the complete Subscription Agreement, but "[s]he did not state that she had never received it." DeCamp's declaration creates an inference that she *received* the complete Subscription Agreement before she signed it, but that she did not *see* the forum selection clause (perhaps because she did not read the Subscription Agreement).

A forum selection clause contained in an adhesion contract is enforceable even where the party does not read the clause, as long as the clause provides adequate notice that the party is agreeing to the jurisdiction stated in the contract. (*Hunt v. Superior Court* (2000) 81 Cal.App.4th 901, 908; *Intershop, supra,* 104 Cal.App.4th at p. 202.)

Here, the forum selection clause gave DeCamp adequate notice that she was agreeing to litigate her case in Delaware. The clause plainly stated that disputes arising out of the Subscription Agreement would be litigated in Delaware and that the parties would submit to the exclusive jurisdiction and venue of the courts of that state. Because DeCamp challenged the enforceability of the forum selection clause, it was incumbent upon her to establish that she did not have sufficient notice of the forum selection clause because she did not receive the entire Subscription Agreement. DeCamp did not satisfy this burden by averring that she did not "see" the complete Subscription Agreement.

DeCamp seems to argue that she established lack of notice because her declaration attached various documents she received from Brennan and Dyer, "none of which included a forum-selection clause." In her declaration, DeCamp stated that she was attaching copies of "various communications [she] ha[d] received, over the years, from Defendants Brennan and Dyer." She did not state that she was attaching *all* of the correspondence she received from Brennan and Dyer; nor, tellingly, did she state that the Subscription Agreement was not one of the documents she received.

Next, DeCamp faults the trial court for denying her request for an evidentiary hearing. She contends that if her declaration "left any doubt" about whether she received notice of the forum selection clause, the court should have permitted her to testify "to clear up the matter[.]" We disagree. DeCamp did not satisfy the requirements of rule 3.1306 of the California Rules of Court and, as a result, the lower court did not abuse its discretion by denying her request to present oral evidence. (*California School Employees Assn. v. Del Norte County Unified Sch. Dist.* (1992) 2 Cal.App.4th 1396, 1405 ["the trial court has broad discretion to decide a case on the basis of declarations and other documents rather than live, oral testimony."]; see also *Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, 483 [holding that section 2009, which enables a trial court to decide a motion based on an affidavit, "empower[s] the trial court to determine motions upon declarations alone and to allow the court discretion to refuse oral testimony"].)

DeCamp also argues that the need for an evidentiary hearing was "particularly acute" because "the goal of the proceeding [was] to determine whether a contractual term

[was] unenforceable on account of some species of fraud or unconscionability."[8] DeCamp contends that *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413 (*Rosenthal*), obligated the trial court to "allow[] the parties to introduce oral testimony" before enforcing the forum selection clause.

In *Rosenthal*, the defendant, a securities corporation, moved to compel arbitration on the grounds that the plaintiffs had executed a client agreement containing an arbitration clause. (*Rosenthal, supra,* 14 Cal.4th at pp. 402-403.) In opposition, the plaintiffs argued that the arbitration agreement was unenforceable because "'there was fraud in the inception of the contract'" and submitted declarations containing evidence that the defendant's representatives did not tell them that the client agreement contained an arbitration clause and assured them that the client agreement was a mere formality needed to open an account. (*Id.* at p. 403.) In reply, the defendant's representatives offered declarations wherein they denied making the allegedly fraudulent statements. (*Id.* at p. 404.) Without holding an evidentiary hearing, the trial court denied the defendant's petition to compel arbitration, concluding that the plaintiffs "'presented sufficient evidentiary support for their allegations of fraud in the inception of the arbitration agreement.'" (*Ibid.*)

The California Supreme Court granted review to address "the procedures by which petitions to compel arbitration . . . are to be determined in the superior courts." (*Rosenthal, supra,* 14 Cal.4th at p. 402.) The *Rosenthal* court rejected the defendant's argument that the trial court must conduct an evidentiary hearing whenever "declarations and documentary evidence present a material factual dispute as to the existence or enforceability of the arbitration agreement[.]" (*Id.* at p. 414.) The court explained, "There is simply no authority for the proposition that a trial court necessarily abuses its discretion, in a motion proceeding, by resolving evidentiary conflicts without hearing live testimony. Nonetheless, we agree that where — as is common with allegations of fraud such as are made here — the enforceability of an arbitration clause may depend upon

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8 On appeal, DeCamp does not contend the Subscription Agreement is unconscionable.

which of two sharply conflicting factual accounts is to be believed, the better course would normally be for the trial court to hear oral testimony and allow the parties the opportunity for cross-examination." (*Ibid.*) The *Rosenthal* court ultimately concluded that the majority of the plaintiffs' declarations "did not present legally sufficient evidence that they reasonably relied on fraudulent representations as to the essential character of the client agreements they signed[.]" (*Id.* at p. 402.)

Rosenthal is not controlling here. First, and unlike the plaintiffs in *Rosenthal*, DeCamp did not submit a declaration in opposition to the motion averring that she was defrauded. In her declaration, DeCamp did not state that she was deceived as to the nature of the Subscription Agreement; that she did not know what she was signing; or that she did not intend to enter into a contract at all. (*Rosenthal, supra,* 14 Cal.4th at p. 415.) Second, *Rosenthal* did not, as DeCamp suggests, hold that an evidentiary hearing is required when a party challenges the enforceability of a forum selection clause.

B. *Fraud in the Execution*

DeCamp argues the forum selection clause is unenforceable for a second reason: defendants committed fraud in the execution. Fraud in the execution occurs when '"the promisor is deceived as to the nature of his act, and actually does not know what he is signing, or does not intend to enter into a contract at all, mutual assent is lacking, and [the contract] is *void*."" (*Rosenthal, supra,* 14 Cal.4th at p. 415, original italics.) Therefore, to establish fraud in the execution, DeCamp must show that her apparent assent to the Subscription Agreement is negated by fraud so fundamental that she was deceived as to the basic character of the document she signed and had no reasonable opportunity to learn the truth. (*Id.* at p. 425.)

We conclude that DeCamp's fraud in the execution argument does not render the forum selection clause unenforceable. In her opening brief, DeCamp contends that defendants concealed the "fundamental nature" of the Subscription Agreement, which "vitiate[d]" her assent and rendered the agreement unenforceable. But the record does not support this contention. In her declaration, DeCamp stated that she did not see the complete Subscription Agreement until after she made the investment; she also stated that

she did not complete the Questionnaire when she invested her money in Broad Street. She did not, however, state that defendants did not tell her what she was signing when she executed the Subscription Agreement, nor did she claim that defendants lied to her about what she was signing. (Cf. *Jones v. Adams Financial Services* (1999) 71 Cal.App.4th 831, 835-837 [substantial evidence supported trial court's finding that defendants committed fraud in the execution; defendants convinced a legally blind elderly woman into taking out a reverse mortgage by telling her she was authorizing them to learn the payoff on her current mortgage].) On the evidence before us, we simply cannot conclude that DeCamp was "'"deceived as to the nature of [her] act,"'" did not know what she was signing, or that she "[did] not intend to enter into a contract at all[.]" (*Rosenthal, supra,* 14 Cal.4th at p. 415.)

We conclude that the trial court did not abuse its discretion when it enforced the forum selection clause.[9] As a result, we need not address DeCamp's alternative claim that the court's order cannot "be upheld on the ground that the defendants are not subject to personal jurisdiction in California."

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9 Throughout her opening brief, DeCamp seems to suggest that the forum selection clause is unreasonable. For example, she claims she cannot litigate her case in Delaware because of her advanced age and because "her entire life's savings is tied up in the defendants' investment funds." We need not address the alleged unreasonableness of the forum selection clause because DeCamp has not explicitly argued that the clause is unreasonable or provided citations to relevant authority. (See, e.g., *Murphy v. Murphy* (2008) 164 Cal.App.4th 376, 406, fn. 15.)

DISPOSITION

The judgment is affirmed. Defendants are awarded their costs on appeal.

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Jones, P.J.

We concur:

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Simons, J.

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Needham, J.